



BUDGET COMMITTEE



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**Colloquy of Senators Gregg, Cornyn and Thune
on the Effect on Social Security of Changing the
Tax on High-Cost Health Plans in Reconciliation
March 18, 2010
Remarks as Delivered**

Mr. Gregg: I rise to discuss one of the issues which is going to have a huge impact on how this health care issue is resolved or not resolved, and that is the question of what reconciliation is and what it implies relative to the legislative process.

Reconciliation is an arcane term. It's a term that is tied to and created by the Budget Act, which we function under here in the Congress. It's ironic that the use of reconciliation would become the central effort in buying votes in the House of Representatives in order to pass the giant health care bill, known as the Senate health care bill, which is the bill, as we all know, that expands the size of government by \$2.4 trillion.

And in fact, we understand now there's a new score from the CBO, which is going to raise that number even further when it's accurately reflected, on this health bill that takes the government and puts it into basically the business of delivering health care in this country in a way that's extraordinarily intrusive and will cost a lot of people who are on private insurance the insurance which they have, which they probably feel they are fairly comfortable with, although it may be very expensive.

In addition, it still leaves 23 million Americans uninsured while claiming it does a better job of insuring Americans, when in fact what it does is create massive debt, explodes the size of government, and in my opinion, will lead to a diminution of care in this country.

The way this big bill, which I outlined in the thumbnail process, is going to be passed in the House of Representatives is to have a trailer bill called the reconciliation bill, which is an art form developed around here relative to the budget process, and is supposed to be used for very specific efforts, certainly not for the purpose of buying votes for the liberal constituents within the House in order to pass the bigger bill.

That bill needs to be discussed in order to understand what its implications are. A number of us have come to the floor today to try to explain what the reconciliation bill is and how it has historically been used, and what the implications are relative to some of the things in the bigger

Senate bill, in the giant spending bill, and what the representations being made are, and whether they're accurate or not.

Specifically, let's take what is known as the Cadillac tax. The Cadillac tax -- the tax on Cadillac insurance policies, is the appropriate way to describe this -- is a proposal which was in the Senate bill to basically eliminate the deductibility for health insurance policies that exceeded a certain level of cost, \$23,000 for family coverage I believe was the number. To the extent an insurance policy paid for by an employer exceeds that number in cost -- let's say it costs \$32,000 for your employer to have an insurance policy for you -- then there is a tax on the excess amount.

That sounds like a lot of money, but there are a number of programs, especially union programs, which cost that much. To the extent the difference between the \$23,000 and the \$32,000 is paid for by your employer, that amount will no longer be deductible by the employer as an expense. It's done in a more complex way, but that's the way it basically works out.

And the effect of that is fairly significant on what's known as the Social Security Trust Fund, because it actually creates a situation where there will be more taxable wages, which will mean that the Social Security Trust Fund will be getting more tax revenue. This brings into play the question of whether or not you can even bring forward language of this type which affects the Social Security Trust Fund through taxing the Cadillac policies in a reconciliation bill. And I think this needs to be discussed because it's a very important issue as to whether or not the House members are being told correctly how this will be dealt with here in the Senate. And I know my colleagues want to speak to this issue.

Mr. Thune: Let me ask my colleague from New Hampshire, if I might, because it seems to me, at least, as you describe this reconciliation trailer bill that the House will use first to try and fix the elements of the Senate bill that they don't like, and then that reconciliation bill would come back to the Senate.

I would ask the Senator, is it not true that the House and Senate have already passed their health care bills? Why then is this second vehicle, this reconciliation bill necessary? It seems, to me at least, that the House, if they're going to vote on the Senate-passed bill, that would put into law most of the provisions that are included in that bill. So why is the second process necessary, I would ask my colleague from New Hampshire?

Mr. Gregg: Well, it appears that the House members, the Democratic membership is, first, afraid to vote on the bill. They're actually going to deem this, it appears, versus vote on it, which is an incredible act of political cowardice. They don't want to go to conference. When you have two different bills, you take them to conference, you meet and you discuss that bill, and then you come out with a final bill. Why don't they want to do that? Because they know they can't pass the final bill here in the Senate under normal Senate procedures.

To try to get around that, they created this different policy of just voting on reconciliation as a trailer bill so that they'll just send back the reconciliation bill to be voted on here without voting on the big \$2.4 trillion bill. And, thus, not only will they avoid a vote in the House on the big

bill, they'll avoid having to go to conference and basically bypass the Constitutional process in this manner.

Mr. Cornyn: If the Senator will yield for a question?

I've heard of this process, whereby the House is going to deem the Senate bill passed and then pass a reconciliation bill which will then be sent over here to the Senate as Speaker Pelosi is asking members of the House to hold hands and jump off a political cliff, hoping the Senate will catch them by passing the reconciliation bill unaltered or just in the same form as it passed the House.

But isn't it true that the complications arise in Section 313 of the Congressional Budget Act because of the Byrd rule? We've heard a lot of talk about the Byrd rule, and what points of order might be appropriate here in the Senate. And I wonder if the Senator -- you touched on this a moment ago -- could explain why, with 41 Senators agreeing to sustain all points of order in the Senate, how many different holes can be punched in the reconciliation bill passed by the House when points of order are sustained?

You mentioned the Cadillac tax, so I will note that the President of AFL-CIO was visiting with President Obama at the White House on Wednesday, seeking further reassurances that the tax on the Cadillac plans would be deferred. Presumably, that would be part of the reconciliation bill. Can you explain what kind of jeopardy the Byrd rule and points of order call into play that would make it unlikely that the President's promise to defer the tax on union Cadillac plans could possibly pass the Senate?

Mr. Gregg: In order to buy votes, as I understand it, in the House -- and this is basically a vote-buying exercise, the reconciliation bill -- in order to buy votes, they're going to put changes to the Senate-passed health bill in the reconciliation bill. And then send the reconciliation bill back here to be voted on, with the theory it only takes 51 votes to pass it. The only problem with that approach is that a reconciliation bill is part of the budget process and has very strict limitations on what can be in it. So much of what they're talking about putting in the reconciliation bill may well be knocked out here in the Senate.

For example, you mentioned the Cadillac tax. If, in any way, the Cadillac policy tax language impacts Social Security, it will be subject to a point of order. In fact, it will be subject to two points of order here in the Senate. And it will take 60 votes to waive that point of order. And, therefore, since the 41 members of the Republican party have signed a letter saying we're going to sustain the rules of the Senate, we're going to stand by the laws that govern the Senate procedures here, that language will be knocked out.

So what is being represented to House Democrats -- as a way to get their vote, to vote for the big bill -- is to include the language in the smaller bill, the reconciliation bill, that delays the Cadillac policy tax but that change probably won't survive the process and will probably be knocked out on a procedural challenge here in the Senate with the Senate rules.

Mr. Cornyn: If I could clarify the point that you made and turn to the Senator from South Dakota. The points of order we're talking about, is it true that under Section 313(b)(1)(F), that provision, that specific provision could drop out of the bill, but under a separate point of order, under 310(g) of the Congressional Budget Act, it could literally bring down the entire bill. Is that a correct reading of the Congressional Budget Act?

Mr. Gregg: The Senator from Texas understands the rules very well. A 310(g) challenge is a challenge that says a provision affects Social Security. The language affects Social Security if the Cadillac policy tax impacts the Social Security Trust Fund, which, in my opinion does, and if the Parliamentarian rules it does, then the entire bill will fall.

Mr. Thune: If I might explore that with the Senator from New Hampshire and follow-up with a question that the Senator from Texas asked: is it correct – as I understand this – the Cadillac tax provisions that were in the Senate bill, that bill's now over in the House, is going to be voted on, but because of the changes that had been proposed to it now, which would delay the implementation of the Cadillac tax -- and the Cadillac tax, as the Senator from New Hampshire explained, would cap the amount of health care benefits that would be tax-free, essentially, so above and beyond that would become taxable. There is an assumption made that there would be a shift of health care benefits by employers to cash compensation, which would be taxable and generate more payroll tax revenues, that was in the Senate bill as it passed here.

Now the bill -- the additions or the modifications being considered in the House -- would delay the implementation date. Therefore, there's a lot of payroll tax revenue that would be coming in under Social Security that will no longer be realized, or at least not be realized until the year 2018, which affects the amount of revenue that would be coming in under the Senate-passed bill if these changes are adopted. As I understand what the Senator from New Hampshire is saying, that impacts the Social Security revenues.

Any changes that are made to Social Security create a violation of the reconciliation process, the Byrd rule, as the Senator from Texas referred to, in the Senate and, therefore, a point of order would lie against that reconciliation bill when it comes back over here. The Majority, I assume, would move to waive that point of order. What happens if that point of order is not waived? If the Majority is not successful in having that point of order waived, what happens to that reconciliation bill that, at that time, would be under consideration in the Senate?

Mr. Gregg: There are two points of order available. One is the Byrd point of order. If a member raises that point of order and that is not waived, that section would go out of the bill. So people who are interested in that section, who use that section as a reason for justifying the bigger bill, that section would not survive, would have been sold a bill of goods. The second point of order would take down the whole bill which would mean that the bill would require 60 votes to pass if brought up again here, and I can absolutely guarantee you it would not get 60 votes to pass. That bill would be dead, the entire reconciliation bill.

Again, people relying on the reconciliation bill in the House of Representatives, House members on the Democratic side who are being told, well, we'll fix it in reconciliation, may well be being sold a bill of goods if it's determined that some of these reconciliation language affects Social

Security because it's very likely that the entire bill will go down here in the Senate because it will violate our Senate rules.

Mr. Cornyn: May I follow-up with the Senator from New Hampshire? By being sold a bill of goods, are you suggesting that the leadership in the House, Speaker Pelosi, is guaranteeing that the reconciliation bill will pass the Senate intact, and they'll have political cover from their constituents who don't like this bill, but they will be able to shape and affect the final outcome? Are you suggesting because of the 41 Senators who have said we will vote against waiving any budget points of order, that there will either be holes punched in that reconciliation bill that will make it impossible for the Speaker to keep her promise to her House members ultimately, or that it will bring down the bill entirely? Is that what the Senator's saying when you talk about selling them a bill of goods?

Mr. Gregg: Well, essentially, what I'm saying, and the Senator from Texas has certainly put it in context here, is that the only reason they could possibly be using this vehicle, this reconciliation vehicle, this extraordinary process, is because they're using it to get people to vote for a bill -- for a bigger bill -- they don't like. And they're claiming that this bigger bill will be improved by the reconciliation vehicle. It's pretty obvious that the reconciliation vehicle, when it comes over here, is going to be punched through and through with holes because it will violate the rules of the Senate on issues like this.

Mr. Cornyn: Is it particularly true of the promise that the President made to union leadership to defer the application of the excise tax on Cadillac health insurance plans, that promise -- like the promise to televise the negotiations to pass the bill on C-Span; the promise that if you have a policy that you like, you can keep it; the promise that it would not raise taxes, and the like -- that would be another promise that would not be kept and a promise that would be broken?

Mr. Gregg: That would be like the 'check's in the mail' type of promise. You know, I would take it with a serious grain of salt.

Mr. Thune: Is it possible, I would say to both of my colleagues, if this process that the House is using, and, this, by the way, deeming the bill passed seems to be a very curious way to try to pass legislation of this consequence that impacts one-sixth of our economy and literally impacts every American in a very personal way, that somehow they want to divorce themselves from accountability for voting for this in the House? Therefore, they're going to use a deeming provision that would essentially pass the bill without having a recorded vote on it, which is incredibly ironic for a legislative body that is supposed to be about debating and voting on legislation.

Let's suppose this happens: they pass the Senate bill and attach a Senate reconciliation vehicle, which both of you have referred to, and it comes over here, and these points of order that have been raised against the bill, which the Senator from Texas and the Senator from New Hampshire have both referred to -- there is the Byrd Rule point of order, the section 313(b)(1)(f) -- if that point of order is raised, and the Chair sustains it, or essentially validates that that is a valid point of order, there would be a motion to waive it, but this 310(g) Social Security point of order that could be raised against the bill would sink the bill entirely. As I understand what the Senator

from New Hampshire is saying, the Byrd Rule point of order would punch holes in it, but it would have to get back to the House of Representatives.

If you're a member of the House of Representatives, the best you can hope for is that you're going to get a bill back in the House that has a lot of these provisions in the bill that would be knocked out.

The worst-case scenario is that if this point of order -- the 310(g) Social Security point of order that could be raised against it -- is not waived by the Senate. And we have signed a letter, all of us have, that we will oppose waiving points of order that will be raised against the reconciliation bill when it gets to Senate.

Under that type of scenario, what happens next? Do the House members who are going to be voting for this, assuming that the Senate is going to fix all these things, then have to have that bill come back, and is there any way in which all of these fixes that they hope are going to be eventually attached to the Senate-passed bill will be attached, or the things that they hope will be fixed in this bill, will be passed? It seems to me they're trusting the Senate to fix these things, and it seems like an incredible leap of faith.

Mr. Cornyn: I would say to the Senator from South Dakota, you explained it very clearly. Can you imagine being asked to cast a career-ending vote because the people in your district hate this bill, yet you're following Speaker Pelosi's instructions to vote for it and defy your constituents? Can you imagine doing it in a context where there's so little certainty as to the outcome because of this reconciliation process, and the Byrd rule, and the points of order that we're talked about? You put that also in a larger context, you mentioned deeming the bill passed, I think that's clearly unconstitutional. Have you ever heard of a bill becoming law that wasn't passed by the House and passed by the Senate? There have been legal scholars who have written this is clearly unconstitutional. There will be perhaps months, maybe years of litigation, possibly going to the United States Supreme Court challenging this bizarre Alice in Wonderland procedure of deeming the bill passed. Can you imagine such a thing?

Mr. Gregg: To take major legislation dealing with the most important domestic policy in the past 50 years, and not vote on it, is an affront to the Constitutional democracy. We're sent here to vote on a lot of issues, and a lot of them are not quite as significant as this one. If you have the most significant issue that you're going to have before you, certainly in my career, you would expect that you would want to vote because you'd want to express yourself. Why did you run for these jobs? Why did you want to serve your constituents if you were not willing to stand up on something of this importance?

I thank the Senator. I thank the Chair. I yield the floor.